Gregory F. Buhyoff
Nevada Bar No. 7627
Law Office of Gregory F. Buhyoff, P.C.
1635 Village Center Circle, Suite 140
Las Vegas, NV 89134-6375
(702) 804-6154 Telephone
(702) 804-6748 Facsimile
Attorneys for Defendants

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

CAESARS WORLD, INC. and PARK PLACE ENTERTAINMENT CORPORATION,

Plaintiffs,

vs.

CYRUS MILANIAN and THE NEW LAS VEGAS DEVELOPMENT COMPANY, LLC,

Defendants.

Case No. CV-S-02-1287-RLH-RJJ

DEFENDANTS' AMENDED PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

FINDINGS OF FACT

1. Plaintiffs Caesars World, Inc. and Park Place Entertainment Corporation ("Plaintiffs") operate various hotel and casino properties in several locations across the country and overseas. Some of these properties are operated under the marks CAESARS or CAESARS PALACE.

2. The primary property owned by plaintiffs is the Caesars Palace hotel and casino located in Las Vegas, Nevada. Since 1966, the Caesars Palace hotel and casino has included a convention center and showroom ~~which it calls the Colosseum Convention Complex. The Caesars Palace hotel and casino, including that portion which plaintiffs call the Colosseum Convention Complex, have been~~

designed in a Roman-Grecian theme using columns and arches mimicking the design features adorning, among other things, the famous, ancient Colosseum of Rome. Aside from its Las Vegas property, plaintiffs have occasionally designated showrooms and, in one case, a restaurant as the Colosseum room or restaurant.

3. On April 10, 2001, plaintiffs publicly announced plans to build a new, 4,000-seat showroom connected to and incorporated within its Caesars Palace hotel and casino to be called the Colosseum. This new colosseum is intended to continue the Roman-Grecian theme permeating the rest of the property. In addition to its architectural features, certain technical features, such as lifts from under the stage to bring up sets and performers, are to mimick these same features originally designed into the ancient Colosseum of Rome.

4. On June 5, 2002, plaintiffs filed an intent-to-use trademark application for the mark COLOSSEUM with the United States Patent and Trademark Office ("USPTO") in International Class 41 for the following services:

> Education and entertainment services, namely operating a sports, entertainment, concert, convention and exhibition arena and the production or co-production of sports, and entertainment events, concerts, conventions and exhibitions for public exhibition, viewing and for radio, television and cable broadcast.

5. Subsequent to the foregoing intent-to-use trademark application, plaintiffs filed an amendment to allege use dated August 26, 2002. The amendment to allege use declared that the mark COLOSSEUM had already been used by plaintiffs in commerce on or in connection with the services stated in the intent-to-use application, with the first use in interstate commerce being on or before

August 6, 1966. In support of the amendment to allege use, plaintiffs submitted a specimen consisting of an admission ticket to a closed-circuit telecast taking place at "Colosseum II-VII" convention level at Caesars Palace."

6. On November 29, 2002, the USPTO mailed plaintiffs an Official Office Action refusing registration of plaintiffs' mark. Among the bases recited by the Examining attorney for the refusal to register is that the mark is merely descriptive in relation to the services claimed. The Examining attorney notes that the word "colosseum" is defined as "a large amphitheater for public sports events, entertainment, or assemblies," and that plaintiffs operate such a facility and are in the process of creating another such facility. In the circumstances, the Examining attorney found that the services for which the mark COLOSSEUM was being claimed "merely identifies the venue to be used to carry out [plaintiffs'] services." Separately, the Examining attorney found that there were no conflicting marks registered or pending in the USPTO.

7. Prior to plaintiffs' filing of their trademark application for the mark COLOSSEUM, defendant Cyrus Milanian ("Milanian") filed an intent-to-use trademark application with the USPTO on April 23, 2001 for the mark THE COLOSSEUM for the following services:

> Business management of resort hotels, casinos and theme parks for others and products merchandising services.

8. On August 21, 2001, Milanian filed another intent-to-use trademark application with the USPTO for the mark ROME LAS VEGAS COLOSSEUM and design for resort hotels, casinos and theme parks business management and product merchandising services.

9. On June 4, 2002, Milanian filed an intent-to-use trademark application with the USPTO for the mark THE COLOSSEUM in International Class 9 for the following goods:

> Gaming machines, namely slot machines and gambling devices, namely interactive video and virtual reality gambling devices.

This mark was published in the *Official Gazette* of the USPTO on December 9, 2002.

10. All of the evidence submitted by plaintiffs fails to show that plaintiffs have ever used the word "colosseum" as a brand of goods or services. Plaintiffs have submitted a few dozen samples of press releases, advertisements, floor plans, tickets and third-party newspaper articles in which the words "colosseum" or "coliseum" have been used in connection with plaintiffs' hotel and casino properties. With the single exception of a single use of the word "colosseum" identifying a restaurant operated by plaintiffs in the Pocono Mountains of Pennsylvania, all of the other uses of the words "colosseum" or "coliseum" by plaintiffs have identified one or another of the colosseums located on plaintiffs' properties. All of these "colosseums" are either showrooms or assembly rooms.

11. In some instances, plaintiffs' evidence shows use of the words "colosseum" or "coliseum" in connection with plaintiffs' trademarks CAESARS or CAESARS PALACE. In these instances, it is clear that the trademark in question is CAESARS or CAESARS PALACE. In other instances, third-party articles do not even refer to plaintiffs' properties, but rather to the structure or design of the ancient Colosseum in Rome. Many of the exhibits marshaled by plaintiffs use the spelling of the word "coliseum," which is not the same as the mark plaintiffs claim. This Court finds that use of this other, accepted spelling indicates that plaintiffs have used the words "colosseum" and "coliseum" not as trademarks, but as generic words. The same is true for such uses plaintiffs have

brought to the Court's attention as the designation "colosseum II-VII" on tickets, showing use of the word "colosseum" as a generic for assembly rooms, not as a brand.

12. The Court further finds that although plaintiffs now wish to claim that their use of the word "colosseum" has been a brand or trademark use, in fact, plaintiffs have never even thought of their use of this word as trademark use. Plaintiffs did not apply for a trademark registration for the COLOSSEUM mark until 2002. Such laxity is inconsistent with the practices of large corporations, much less marketing-oriented large corporations. The failure to seek trademark protection for this mark tends to show the non-use of the word "colosseum" as a trademark. Further, when the trademark application for the mark COLOSSEUM was first prepared, it was filed as an intent-to-use trademark application. Again, this is consistent with plaintiffs' not believing their use of the word "colosseum" was as a trademark, but rather as a generic word. Finally, plaintiffs' inability to find a suitable specimen to support their amendment of use is consistent with the actual, non-use of the mark COLOSSEUM for services.

CONCLUSIONS OF LAW

1. It is a fundamental premise of trademark law that a generic word cannot function as a trademark. Generic words may be used by anyone in connection with the goods or services they identify, and cannot be claimed as the exclusive property of anyone for such goods or services.

2. The Court has found that plaintiffs' use of the mark COLOSSEUM to identify the colosseums, namely, showrooms and assembly rooms, at their various properties is a generic use of the word. As such, plaintiffs have failed to demonstrate that they have trademark rights in this mark. Plaintiffs have failed to introduce evidence that they have used the mark COLOSSEUM in connection with the services identified in their trademark application. To the extent plaintiffs have made any such

use, this Court agrees with the conclusions of the USPTO Examining attorney, but independently, holds, that the mark COLOSSEUM is merely descriptive in connection with such use, as it is appurtenant to plaintiffs' use of the mark in connection with their colosseums, namely, showrooms and assembly rooms. Any use of the mark by Plaintiffs has been sporadic, non-continuous, and, at times, wholly interstate.

3. This Court has found that Defendant Cyrus Milanian has not engaged in any form of trademark infringement or unfair competition under the Lanham Act or Nevada law, with respect to the marks THE COLOSSEUM and ROME LAS VEGAS COLOSSEUM, or any mark including the words "Colosseum," "Colloseum," "Coliseum" or any variation thereof.

4. This Court has found that Defendant The New Las Vegas Company, LLC has not engaged in any form of trademark infringement or unfair competition under the Lanham Act or Nevada law, and have not represented or implied on the internet, or in any other fashion, that it has any trademark rights in the marks THE COLOSSEUM and ROME LAS VEGAS COLOSSEUM, or any mark including the words "Colosseum," "Colloseum," "Coliseum" or any variation thereof.

5. Plaintiffs seek declaratory judgment declaring that their use of the mark COLOSSEUM does not infringe any rights of Milanian. However, Milanian is the applicant named in intent-to-use trademark applications, on file with the USPTO and currently in good standing for the marks THE COLOSSEUM and ROME LAS VEGAS COLOSSEUM for several categories of goods and services. As plaintiffs have failed to establish that they have any superior rights to the mark COLOSSEUM for any of the categories of goods and services covered in Milanian's applications, the Court declines to declare that their use of the COLOSSEUM mark for any of the goods and services listed in Milanian's applications is non-infringing.

6. For all of the reasons stated in the foregoing paragraph, the Court declines to declare that Milanian has no right, title or interest in the marks THE COLOSSEUM or ROME LAS VEGAS COLOSSEUM, or any mark or domain name including the words "colosseum," "coloseum," "coliseum" or any other variation of such name.

7. For all of the reasons stated above, the Court declines to issue preliminary or permanent injunctions restraining defendants from any advertisement, marketing or other use in interstate commerce, including as a domain name, any of the following marks: THE COLOSSEUM and ROME LAS VEGAS COLOSSEUM, or any mark including the words "colosseum," "coloseum," "coliseum" or any variation of such name.

8. For all of the reasons stated above, the Court declines to order the cancellation and/or abandonment of Application Serial Nos. 78/059,830, 76/302,255, 78/090,499, 78/093,285, 78/134,219 and 78/132,978 as Defendant Milanian has filed each of these Applications for U.S. Trademark Registration in good faith, with a bona fide intention to use the mark, as alleged, in commerce.

9. For all of the reasons stated above, the Court declines to award plaintiffs damages, costs or reasonable attorneys fees, and instead awards Defendants reasonable attorneys fees and costs.

8. Plaintiffs seek redress under the Lanham Act for infringement of plaintiffs' common-law rights in the mark COLOSSEUM by Milanian's display of the mark COLOSSEUM on a web site he operates at www.resortcenter.com. For all of the reasons stated above, plaintiffs have failed to show that they have rights in this trademark superior to those of Milanian. Accordingly, plaintiffs are entitled to no relief under Section 43(a) of the Lanham Act.

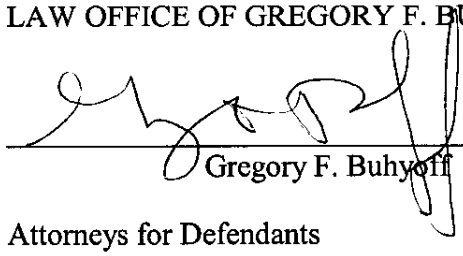
9. Plaintiffs seek redress under Nevada common law for unfair competition by Milanian's display of the mark COLOSSEUM on a web site he operates at www.resortcenter.com. For all of the

reasons stated above, plaintiffs have failed to show that they have rights in this trademark superior to those of Milanian. Accordingly, plaintiffs are entitled to no relief under Nevada common law.

10. Plaintiffs' motion for preliminary injunction did not address the claims made in their fourth and fifth causes of action concerning the trademarks EMPIRE and the ROMAN EMPIRE. Accordingly, the Court does not award any relief on the fourth and fifth causes of action at this time.

Respectfully submitted this 15th day of January, 2003.

LAW OFFICE OF GREGORY F. BUHYOFF, P.C.



Gregory F. Buhyoff

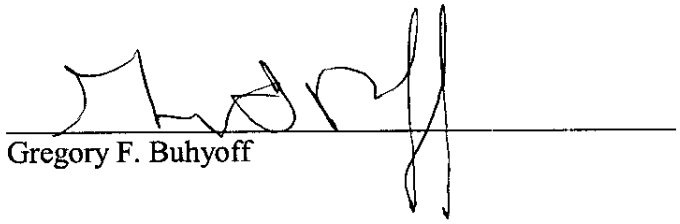
Attorneys for Defendants
Nevada Bar No. 7627
1635 Village Center Circle, Suite 140
Las Vegas, Nevada 89134
(702) 804-6154

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was hand delivered on this 21st day of January, 2003, to:

Stephen W. Feingold
Richard H. Brown
PITNEY, HARDIN, KIPP & SZUCH, LLP
685 Third Avenue
New York, New York 10017-4024
Phone: (212)297-5800

Gary R. Goodheart, Esq.
Nevada Bar #1203
JONES VARGAS
3773 Howard Hughes Parkway
Third Floor South
Las Vegas, Nevada 89109
Phone: (702)862-3300
Fax: (702)737-7705



Gregory F. Buhyoff